93-876

No. 93—

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

OFFICIAL COMMITTEE OF CUSTOMERS OF COLUMBIA GAS TRANSMISSION CORPORATION,
Cross-Petitioner,

v.

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF COLUMBIA GAS TRANSMISSION CORPORATION,
Cross-Respondent.

Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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CROSS-PETITION FOR A WRIT OF CERTIORARI

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December 3, 1993

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QUESTION PRESENTED

Whether the court of appeals correctly applied the lowest intermediate balance test to funds that it had ruled, as a matter of federal law, were not property of the debtor's estate but instead were held for the benefit of the debtor's customers.

LIST OF PARTIES AND RULE 29.1 LIST

The caption of the decision below (Pet. App. 1a-37a)* contains the names of the parties.

The Official Committee of Customers of Columbia Gas Transmission Corporation is the official body appointed by the United States Trustee pursuant to Section 1102 of the Bankruptcy Code, 11 U.S.C. § 1102, to represent the interests of the customers of Columbia Gas Transmission Corporation. The publicly held customers on whose behalf the Committee acts are:

Baltimore Gas and Electric Company
Central Hudson Gas & Electric Corp.
Columbia Gas Distribution Co.
Commonwealth Gas Services, Inc.
Corning Natural Gas Corp.
Delmarva Power and Light Co.
Delta Natural Gas Company, Inc.
Eastern Short Natural Gas Company, Inc.
Elizabethtown Gas Company, Inc.
Kentucky Ohio Gas
Lakeside Gas
Mountaineer Gas Company
National Fuel Gas Supply Corp.
National Gas & Oil, Inc.
New Jersey Natural Gas Company
New York State Electric & Gas Corp.
North Carolina Natural Gas Corp.
Northeast Ohio Gas
Orange and Rockland Utilities, Inc.
Pennsylvania Gas & Water Company
Peoples Natural Gas Co.
Piedmont Natural Gas Company, Inc.
Roanoke Gas Company, Inc.
South Jersey Gas Company

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* "Pet. App." citations are to the appendix to the pending petition in No. 93-695.

The Cincinnati Gas & Electric Company
The Dayton Power and Light Company
The Providence Gas Company
The Union Light, Heat & Power Company
UGI Corp.
Verona Natural Gas
Virginia Natural Gas Corp.
Washington Gas Light Company
West Ohio Gas Company, Inc.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES AND RULE 29.1 LIST	ii
OPINIONS BELOW	2
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	3
CONCLUSION	5

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CROSS-PETITION FOR A WRIT OF CERTIORARI

The Official Committee of Customers of Columbia Gas Transmission Corporation files this cross-petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case. Cross-respondent Official Committee of Unsecured Creditors of Columbia Gas Transmission Corporation has filed a petition for a writ of certiorari in No. 93-695, which seeks review of the same judgment. For the reasons

stated in our brief in opposition in No. 93-695, that petition should be denied. If it is granted, however, the Court should grant this cross-petition so that it may review the entire judgment of the court of appeals.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-74a) is reported at 997 F.2d 1039. The opinion of the district court (Pet. App. 75a-122a) is not reported. The opinion of the bankruptcy court (Pet. App. 123a-144a) is reported at 136 B.R. 930.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 1993. The order of the court of appeals denying a timely petition for rehearing was entered on August 6, 1993. (Pet. App. 145a-181a.) The petition for a writ of certiorari in No. 93-695, seeking review of the same judgment, was filed on November 3, 1993. This conditional cross-petition is filed under Rule 12.3 of the Rules of this Court. The Court has jurisdiction over this cross-petition under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved appear in the petition and in our brief in opposition in No. 93-695.

STATEMENT OF THE CASE

We incorporate herein the statement in our brief in opposition to the petition in No. 93-695.

REASONS FOR GRANTING THE WRIT

We contended in the court below that the lowest intermediate balance test should not be applied to the pre-petition refunds received by the debtor Columbia Gas Transmission Corporation ("Columbia") because (a) Columbia was simply a conduit for the payment of those funds from upstream pipeline companies to downstream customers, (b) Columbia's commingling of the refund monies as a matter of cash management prudently served the goals of the Natural Gas Act and should not redound to the disadvantage of the gas consuming public, and, in any event, (c) Columbia had both the intention and ability to replenish the account with funds sufficient to pass on the refunds.[1]

The court of appeals rejected those arguments. It held that, although Columbia had received some $21 million in pre-petition refunds (approximately $6 million of which were in the form of billing credits), because its cash account on the petition date contained only $3.3 million, that $3.3 million constituted the "lowest intermediate balance" and hence was the maximum amount of pre-petition refunds available for distribution to Columbia's customers. (Pet. App. 66a-67a.)[2] Judge Nygaard dissented on this issue, concluding that the majority's result "contravenes the congressional intent behind the Natural Gas Act" and that Columbia should be permitted to flow through the full $21 million in pre-petition refunds. (*Id.* at 74a.) Judge Nygaard noted that, even if the lowest intermediate balance test properly applied to this case, the full $21 million should flow through

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[1] Brief of Appellant The Official Committee of Customers, at 43-48, in *In re The Columbia Gas System, Inc., and Columbia Gas Transmission Corporation*, 3rd Cir., Nos. 92-7412 and 92-7413, filed Sept. 23, 1992.

[2] The court also held that the lowest intermediate balance test would have no impact on Columbia's ability to pass through post-petition refunds. (Pet. App. 67a-68a.)

because Columbia had replenished the $17.7 million difference between the $21 million and the lowest intermediate balance. (*Id.* at 73a n.1.)

The applicability of the lowest intermediate balance test was a secondary issue in this case. The principal issue, and the subject of the petition in No. 93-695, was whether federal or state law should determine whether the refunds were Columbia's "property" within the meaning of § 541 of the Bankruptcy Code. Because the court of appeals correctly resolved that overarching issue, we did not independently seek review of its ruling on the intermediate balance test issue.

If the Court grants review in No. 93-695, however, then this cross-petition should be granted as well. We believe that plenary review in No. 93-695 would result in an affirmance on the choice of law issue, given the importance of the federal involvement and the federal interests at stake. The Court would then be in a position readily to resolve the related issue raised in this cross-petition. In our view those same federal interests would lead the Court to reject the lowest intermediate balance test, or, at the least, to hold that the subject account may be replenished. We have accordingly filed this cross-petition so that, in case the Court does grant review in No. 93-695, it may review the entire judgment of the court of appeals.

CONCLUSION

The Court should deny review in No. 93-695. If it grants the petition in that case, however, it should also grant this cross-petition.

Respectfully submitted,

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